IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 26/03/2004

Coram

The Hon'ble Mr. Justice P. SATHASIVAM
and
The Hon'ble Mr. Justice S.R. SINGHARAVLELU

Referred Trial No. 1 of 2004
and
Criminal Appeal No. 311 of 2004.

R.T.No.1/2004

Principal Sessions Judge,
Virudhunagar District
at Srivilliputhur. ..Referring Officer.

Marimuthu,
Son of Balaswamy,
Thiruvannamalai, Srivilliputhur,
Virudhunagar District. (Now lodged at
Central Prison, Madurai). ..Respondent.

Crl.Appeal No.311 of 2004

Marimuthu,
Son of Balaswamy,
Thiruvannamalai, Srivilliputhur,
Virudhunagar District.
.. Appellant

-Vs-

State by
Inspector of Police,
Srivilliputhur Town Police Station,
Srivilliputhur, Crime No. 434/99. ..Respondent.

Referred Trial for confirmation of death sentence passed by judgment dated 06-02-2004 in S.C.No. 227/2000 on the file of Principal Sessions Judge, Virudhunagar District at Srivilliputhur and Criminal Appeal by the accused in S.C.No.227/2000 against the same judgment.

!Mr. P. Venkatasubramanian:- For Appellant in C.A
& Respondent in RT.

^Mr. I. Subramanian, Public Prosecutor:- For Respondent in C.A.

:JUDGEMENT

(Judgement of the Court was delivered by P. Sathasivam, J.,)

Marimuthu, Single accused in Sessions Case No. 227 of 2000 on the file of Principal Sessions Judge, Virudhunagar District at Srivilliputhur is the appellant before us. He was charged for murdering three people, and for attempting to murder three more people on 1-5-1999. He faced trial on the said charges and convicted and sentenced to death for offence under Sections 302 I.P.C., (3 counts); seven years R.I. for each count for offence under section 307 I.P.C.(3 counts); and three years R.I. for offence under Section 449 I.P.C. on 06-02-2004 by the Principal Sessions Judge, Virudhunagar District at Srivilliputhur. On the reference made by the learned District Judge, both the Reference and Appeal were heard together.

2. For convenience, the parties are referred herein as described in the trial Court. The case of the prosecution is briefly stated hereunder:
(a) The accused is a native of Thiruvannamalai village, Srivilliputhur Taluk, Virudhuangar District. He was married to one Perumal Ammal (third deceased-in short "D3"), Ramalakshmi (P.W.31) and Murugeswari (P.W.1). He wanted to marry another lady by name Lakshmi (P.W.13), who happened to be none other than the sister of D3, fourth time. The accused considered the presence of P.W.1 i.e., his third wife as a stumbling block to his wishes and therefore he decided to finish her off. In the course of events, the accused ended up murdering three people and severely injuring three more.

b) On 01-05-1999, around 3 P.M., the accused picked up quarrel with P.W.1 stating that she is the stumbling block in his not being able to marry P.W.13. In the course of arguments, the accused attacked P.W.1 with Aruval (M.O.4). When one Vellayammal (1st deceased-in short "D1"), who is the mother of P.W.1 intervened, she was brutally injured and she succumbed to the injuries on the spot.

c) Thereafter, the accused went to the house of Thangaia Pillai (Deceased No.2-in short "D2") who is the father of D3 and P.W.13-Lakshmi. There he picked up a quarrel, in the course of which he attacked D2, P.W.12,Muthuveerammal and P.W.13-Lakshmi. D3, who intervened at that time, was brutally attacked by the accused. D3 also succumbed to the injuries on the spot. P.w.19 arranged for a van to transport the injured to the Hospital at the request of P.W.13. P.W.12, P.W.13, D2 and P.W.1 were transported in the van to the Srivilliputhur Government Hospital. On the basis of information received through telephone, P.W,.50-Sub Inspector of Police, Srivilliputhur Town Police Station, rushed to the hospital and recorded the statement of P.W.1. First Information Report was recorded at the hospital itself. Thereafter, around 7 P.M. P.W.50 returned to Police Station and registered a case in Crime No. 434/1999. A copy of First Information Report

was sent to Judicial Magistrate No.2 through P.W.48, Head Constable and it reached the Judicial Magistrate No.2 at 23.30 hours on 01-05-1999. P.W.49 is the investigation officer. P.W.50 conducted inquest on D1 and D3 on the night of 01-05-1999 and thereafter in the early hours on 02-05-1999 he conducted inquest on D2 whose body was in the Srivilliputhur Government Hospital.

d) The accused was arrested on 19-5-99. He gave a voluntary confession statement, pursuant to which M.O.4-Aruval and other Material Objects were recovered. Blood-stained objects were sent for Serologist report.

3. The prosecution has examined as many as 50 witnesses as P.Ws.1 to 50, marked documents-Exs. P-1 to P-39 and produced M.Os.1 to 43. On the side of the accused, no one was examined and no documentar was marked.

4. When the accused was questioned under Section 313 Cr. P.C., with regard to the incriminating circumstances appearing against him, he denied the offences and pleaded not guilty.

5. On appreciation of oral and documentary evidence, after accepting the prosecution case, the learned Principal Sessions Judge convicted the accused on all the charges and sentenced to death for offence under Section 302 IPC (3 counts); R.I. for 7 years for each count under Section 307 IPC (3 counts); and R.I. for 3 years for the offence under Section 449 IPC and all the sentences were ordered to run concurrently. Hence the Reference at the instance of the learned trial Judge and Appeal by the accused.

6. Heard Mr.P. Venkatasubramanian, learned counsel for the appellant/accused and Mr. I. Subramanian, State Public Prosecutor for Respondent/Complianant.

7. (a) Mr. P. Venkatasubramanian, learned counsel for the accused after taking us through the entire materials placed before the trial Court, would contend that the Court below failed to note that the accused had no motive to commit the offences. He also contended that the Court below failed to appreciate the material contradictions found in the evidence of prosecution witnesses. He also contended that inasmuch as most of the prosecution witnesses turned hostile, particularly for second occurrence, the conviction and sentence cannot be sustained. In any event, according to him, the capital punishment of death sentence is not warranted.
b) On the other hand, Mr. I. Subramanian, learned State Public Prosecutor, would contend that inasmuch as the prosecution has established motive for the occurrence, no reason to disbelieve the three injured eye witnesses to the occurrence. He further contended that the prosecution has proved the first and second occurrences by placing acceptable evidence and in the absence of any mitigating circumstance, considering the gravity of the offences, namely, murdering 3 persons and attempting to murder 3 more persons, the learned trial Judge has rightly convicted and sentenced him by awarding appropriate punishment and no interference is called for.

8. We have carefully considered the rival submissions.

9. The first charge against the accused is under Section 302 IPC (3 counts); second charge is under Section 449 IPC; and the third charge is under Section 307 IPC (3 counts). The occurrence took place on 01-05-1999. The motive for the occurrence as seen from the prosecution evidence is that though the accused married to D3, P.W.31 and P.W.1, he wanted to marry P.W.13 fourth time. P.W.13 is none other than the sister of D3. The accused considered the presence of P.W.1 as an obstacle to his wishes and, therefore, decided to finish her off. P.W.1-Murugeswari, third wife of the accused, has stated that though initially she did not give her consent for marrying the accused, on persuasion by her parents, the marriage was performed in Perumal Koil at Thiruvannamalai. After the marriage, she lived with him three years. Only when she came to the accused's house, she came to know that the accused married her as his third wife. On the date of the occurrence i.e.,on 1-5-99, her mother-D1 came to her house. P.W.1 told to her mother-D1 that the accused pledged her stud (kammal), for which she (D1) shouted her and also informed this fact to the paternal uncle of the accused, who was residing in the neighbouring house. In the evening around 3 P.M., his paternal uncle came to his house and shouted at the accused. At that time, P.W.1 and D1 were sitting under a tree near her house. Having infuriated with the shouting of his uncle, the accused came out from the house with an Aruval and cut on her neck with the said Aruval. The cut fell on her left shoulder. When she attempted to run, he inflicted several cut injuries of her left arm, left chest, hip, stomach etc. When her mother D1 questioned the conduct of the accused in cutting her daughter/he (accused) cut her mother on the left wrist with the same Aruval and again inflicted injuries on the chest, neck, due to which D1 fell down and succumbed to the injuries on the spot. It is also the evidence of P.W.1 that when she questioned the conduct of the accused, namely in attempting to marry Lakshmi-P.W.13, the accused shouted that "you are the stumbling block" and inflicted several injuries on her. After causing injuries to P.W.1 and murdering D1, the accused left the first scene of occurrence and rushed towards west with Aruval. The same was witnessed by the neighbours, namely, Ramesh-P.W.27, Mariappan-P.W.28, and Mariammal-P.W.4. The first occurrence took place at 3 P.M. and after causing grievous injuries to P.W.1 and fatal injuries to D1, the accused went to the second place of occurrence at 3.15 P.M.

10. With reference to the second occurrence, P.W.12Muthuveerammal, another injured eye witness, narrated the same. The accused is her nephew (brother's son) and she is the mother of P.W.13 and D3, who is the first wife of the accused. She is also the wife of D2. She speaks about the three marriages the accused had and the sequence of events that led to the death of her daughter D3 and husband D2. She speaks about the accused getting furious as he was refused to marry P.W.13 as his fourth wife. P.W.12 explained before the Court that when Thangaiya Pillai, her husband and D2, taking rest outside the house and she and her daughter-Lakshmi-P.W.13 were inside the house. Her another daughter Perumal Ammal (D3) was seeing Television in the next house. On hearing the noise of the accused and her husband-D2, P.W.12 and P.W.13 came out and saw the accused cutting his husband-D2 with Aruval by saying that "without giving his daughter to him, how they arranged her marriage to somebody. Thereafter, the accused pulled P.W.13 with a request to marry him. When she refused to accede to his request and P.W.12 pushed her, the accused

cut her (P.W.12) left hand and right hand. He also inflicted injuries on both the hands and legs. When Perumal Ammal-D3 questioned the conduct of the accused, after shouting that "cd;idiaj; jhz;o njondd;/////@ cut injury on her hip and thereafter causing several injuries on her body. D3 fell down and died on the spot.

11. Apart from the injured witnesses P.W.1, and P.W.12, another injured person namely Lakshmi-P.W.13 narrated the second occurrence that took place at 3.15 P.M. P.W.13 is none other than the sister of D-3 and second daughter of P.W.12 and D2. She also explained about the three marriages the accused had and the sequence of events that led to the death of her sister D3 and her father D2. She also speaks about the accused getting furious, as his request to her parents to marry her as his fourth wife was negatived.

12. The prosecution has also examined P.W.6 Meenakshi, who is the wife of P.W.5. She deposed before the Court that she saw P.W.1 pleading to her husband (accused) not to injure her, but still the accused inflicted several injuries on her. She also deposed that after injuring P.W.1 and causing the death of D1, the accused went towards the western side with Aruval-M.O.4.

13. One K. Govindaraj who lives close to the house of D1 and D3 was examined as P.W.14. He implicated the accused with the second occurrence and he saw the accused cutting D2 and D3 and causing injuries to P.Ws.12 and 13. P.W.15 is his wife. He also speaks about the three marriages the accused had. At 3.15 P.M., he saw the accused coming with Aruval-M.O.4 and inflicting several injuries on Thangaiya Pillai-D2. P.W.14 his wife P.W.15 deposed that when they rushed to the scene of occurrence, the accused threatened them. At that time, P.W.14 saw several injuries on Thangaiya Pillai-D2; Muthu Veerammal-P.W.12; Lakshmi-P.W.13. He referred to the various injuries inflicted by the accused on all those persons. Due to the injuries, D3 fell down and succumbed to the injuries on the spot. He saw the accused running towards west with Aruval-M.O.4.

14. P.W.17, who lives 4 or 5 houses away from D2's house, deposed that she knows the accused. She heard a noise from P.W.12's house. She went there and saw P.W.12, P.W.13 and D2 with cut injuries. She was told that the accused attacked them.

15. P.W.19-Pechiammal deposed that at the request of P.W.13, she arranged a van to transport the injured to the hospital.

16. P.W.28-Mariappan, who resides at Thiruvannamalai and runs a provision store, has stated that the accused's house is situated on the western side of his house. He also stated that P.W.1 is the third wife of the accused and that the accused and P.W.1 fought often. He further deposed that around 3 P.M. on the date of occurrence, when he was in his shop, he heard some noise and got down from his shop and saw the accused fighting with D1 and P.W.1-Murugeswari. According to him, when he tried to negotiate the accused, the latter threatened him with dire consequence. He further deposed that the accused cut P.W.1 and D1 with Aruval and left the place. He also deposed that he heard through P.W.4 that the accused caused injuries to D2, D3 and P.Ws.12

and 13. He further deposed that he along with others helped the injured in transporting them in a van to the hospital for treatment.

17. P.W.29, brother of P.W.1 and son of D.1, deposed that the accused and his sister P.W.1 used to fight each other often. He also deposed that the accused promised to live with her without any problem and that the accused signed a compromise deed on 28-3-99. P.W.30, who is the Village President of the

village to which P.W.1 belongs, also deposed that a compromise deed dated 28-3-99 was entered into by the accused and his father and he put his signature along with few others as witness.

18. Second wife of the accused, namely, Ramalakshmi, P.W.31, explained about the character of the accused. According to her, only after getting married, she came to know that the accused had already married one Perumal Ammal as 1st wife. He explained about the torture given by the accused and his father. She also explained the divorce between herself and the accused and that the divorce terms were reduced to writing in a stamp paper. Her father Chinnaiya Pillai was examined as P.W.32. He also explained about the character of the accused. He speaks about the getting of marriage of her daughter Ramalakshmi with the accused and about the torture she experienced at the hands of the accused. On the intervention of the village headmen, a divorce between his daughter Ramalakshmi and the accused was proposed and a release deed to that effect was reached. Ex. P-4 is the release deed. P.W.33 Srinivasan, brother of P.W.12, has stated that P.W.12 approached him with a proposal to marry her second daughter Lakshmi with his (P.W.33) son Duraipandi due to the problem created by the accused. Accordingly, a betrothal was done to perform the marriage between P.W.13 and the son of P.W.33 in Vaikasi, 1999.

19. The evidence of the above witnesses, particularly the injured eye witnesses, namely, P.Ws.1,12, and 13 would clearly prove that the accused had married Perumal Ammal (D3) first time; then Ramalakshmi (P.W.31) second time; and then Murugeswari (P.W.1) third time; and finally attempted to marry Lakshmi (P.W.13) fourth time. The evidence would also prove that the accused caused the death of D1, D2, D3, and inflicting injuries on several persons, including P.Ws.1,12 and 13. There is no reason to disbelieve their versions. Apart from the evidence of the injured witnesses, namely, P.Ws.1, 12 and 13, the other witnesses, namely, P.Ws.6, 14, 17, 19, 28, 29, 30, 3 1, 32 and 33 explained about the conduct of the accused, in marrying 3 persons, attempting to marry another person-P.W.13, refusal by the parents of P.W.13, the action of P.W.1 questioning the conduct of the accused, causing fatal injuries on D1, D2 and D3 and inflicting injuries on P.Ws. 1, 12 and 13. There is no reason to disbelieve their version.

20. Now let us consider the medical evidence with reference to the death of D1, D2 and D3 and the injured persons-P.Ws.1, 12 and 13. P.W.41, Dr. Santhanakrishnan, Assistant Medical Officer attached to Government Hospital, Srivilliputhur explained the injuries found on P.Ws.12 and 12 and the treatment given to them. He deposed that there were 9 injuries found on P.W.12, of which injuries 1,3,4 and 6 are grievous in nature. He also found 6

injuries on P.W.13 of which, injuries 1 to 4 are grievous in nature. Exs. P-19 and P-20 are the respective wound certificates issued to P.W.12 and P.W.13 respectively. He also deposed that the said injuries could have been caused by a weapon like M.O.4 Aruval. P.Ws.12 and 13 were sent to Madurai Government Hospital for further treatment.

21. P.W.42, Dr. Veerasekar, Assistant Professor of Surgery in Government Rajaji Hospital, Madurai, has stated that P.Ws.12 and 13 were brought to Madurai Government Hospital from Srivilliputhur Government Hospital for further treatment. After taking treatment, according to him, P.W.12 was discharged on 8-5-99 and P.W.13 on 17-8-99. The medical reports of P.Ws.12 and 13 are Exs. P-21 and P-22 respectively.

22. Dr. Mary, the then Medical Officer of Srivilliputhur Government Hospital was examined as P.W.44. She treated P.W.1. She explained about the treatment given to P.W.1 and the injuries she had sustained. She found as many as 5 injuries on her and according to her, among the injuries, injury Nos. 2 and 3 are grievous in nature and the injuries could have been caused by a weapon like by M.O.4. Ex.P-26 is the wound certificate issued by her.

23. Dr. V. Raviraman, Chief Medical Officer in Orthopaedic Department, Rajaji Government Hospital, Madurai, was examined as P.W.46. He deposed that on 1-5-99 at 9 p.m. P.W.1-Murugeswari was brought to his hospital from Government Hospital, Srivilliputhur for further treatment. He found on her a fracture on her left shoulder, and injuries on her upper arm, left fore-arm, left flank and left abdomen. She was admitted as an in-patient till 14-7-99 and the medical report issued to her is Ex. P-27.

24. P.W.43, Dr. A.S. Ramesh, Assistant Medical Officer, Government Hospital, Srivilliputhur, conducted Post-mortem on the body of D1, D2 and D3. He noted 5 external injuries on the body of D1 and issued Post-mortem certificate Ex.P-23. He also noted 6 external injuries on the body of D2 and issued Post-mortem certificate Ex.P-2 5. He found 4 external injuries on the body of D-3 and issued Ex.P-2 4 Post-mortem certificate. When M.O.43 was questioned as to the possibility of the injuries, he has stated that the injuries on D1, D2 and D3 were possible by means of Aruval like M.O.4. The evidence of P.Ws.41, 42, 43 and 44 and 46 amply prove and speak about the injuries sustained on P.Ws. 1, 12 and 13 and bodily injuries found in D1, D2 and D3. They also opined that those injuries could have been caused by a weapon like M.O.4. We are satisfied that the evidence of P.Ws.41 to 44, and 46, wound certificates-Exs. P-19, P-20, P-21, P-22, P-2 6 and P-27 and Postmortem certificates-Exs. P-23, 24 and 25 clearly prove the case of the prosecution.

25. One K. Subbaram, the then Sub Inspector of Police, Srivilliputhur Town Police Station and now retired, was examined as P.W.50. He deposed that on 1-5-99 at about 5.45 P.M., he received a phone message around 6 P.M. from the Government Hospital, Srivilliputhur, went there and obtained information memo-Ex.P-39, and recorded statement-Ex.P1 from P.W.1-Murugeswari between 6.15 P.M. and 6.45 P.M. Then he returned to the Police Station at 7 P.M.,, registered a case in Crime No. 434 of 1999 under Sections 307 and 302 IPC and

and sent the F.I.R. and other documents to the Court. Ex. P-33 is the printed First Information Report. Then he entrusted the case to the Inspector of Police for further investigation.

26. P.W.49, the then Inspector of Pollice, Srivilliputhur Town Police Station, elaborated about the visiting the scene of occurrence, preparing mahazar, collection of samples for chemical analysis, sending the bodies for Post-mortem, arrest of the accused on 19-5-1999, recording of the confessional statement given by the accused, recovery of M.O.4 pursuant to that, preparation of sketch in the scene of occurrence, recording the statement of witnesses etc. We are satisfied that there is no delay in complaining the incident to the police, sending the First Information Report to the Court and the investigation done by P.W.49 upto the filing of charge sheet on 4-11-99 against the accused under Sections 449, 307 and 302 I.P.C.

27. P.W.38, S.T. Venkatakrishnan, Village Administrative Officer, Venkateshvarapuram, on 1-5-99 at about 8 P.M., attested observation mahazar-Ex.P-6, along with one Murugan, prepared by the Inspector of Police in the scene of occurrence. He speaks about the collection of samples such as blood-stained sand from the scene of occurrence. P.W.39-K. Natarajan deposed that on 19-5-99 at about 10.30 A.M., the Inspector of Police enquired the accused at Madagarvilagam grave yard, Srivilliputhur in his presence. At that time the accused gave a confessional statement, the admissible portion of which is Ex. P-13. Pursuant to Ex.P-13, M.O.35 was recovered from one Koodalingam under Ex. P-14 mahazar at 2.45 P.M., at Sannathi Street, Srivilliputhur; and M.O.4 Aruval, blood-stained shirt-M.O.36 and bloodstained Kaili-M.O.37 were recovered under Ex.P-15 mahzar at about 1.30 P.M. between two rocks at Thiruvannamalai. He attested Exs. P-14 and P-15 . P.W.40-Rajmohan, Assistant Medical Officer and Radiologist, Rajaji Government Hospital, Madurai to whom X-rays taken from P.Ws.1, 12 and 13 had been referred to. He explained about the X-rays-M.Os.38, 39 and 40 and he issued reports Exs. P-16, 17 and 18.

28. The evidence of witnesses, particularly the evidence of P.Ws.1, 12 and 13, coupled with the above materials clearly prove the motive for the occurrence and the manner in which the accused murdered D1, D2 and D3 and caused grievous injuries to P.Ws.1, 12 and 13. The prosecution has also

clearly established the fact that all the injuries were caused by using M.O.4 Aruval and accordingly hold that the prosecution has proved all the charges framed against the accused beyond all reasonable doubts.

29. Now let us consider the sentence awarded to the accused, more particularly whether the capital punishment, namely, death sentence awarded to the accused is acceptable or not? As a matter of fact, the argument advanced by the learned counsel appearing for the appellant is with regard to the awarding of sentence. In this aspect, he (learned counsel for the appellant) points out two infirmities in the order of the learned Sessions Judge. According to him, after arriving at a conclusion that the prosecution has proved its case beyond all reasonable doubts in respect of the charges

levelled against the accused, the trial Court, while questioning the accused as to the awarding of sentence or proposed punishment, failed to follow the provisions contained in sub-section (2) of Section 235 of the Code of Criminal Procedure. According to him, the learned Sessions Judge without affording an adequate opportunity to the accused to highlight his mitigating circumstance, imposed the sentence of death on the same day i.e., on 05-02-2004. He also points out that the procedure followed and adopted by the learned Sessions Judge is not acceptable and not in consonance with the provisions referred to above. He further contended that affording an opportunity of hearing before passing the order of sentence is mandatory and it is illegal to convict and impose sentence on the same day. On the other hand, learned State Public Prosecutor by pointing out the Court proceedings/records, would submit that the accused was questioned with reference to the proposed sentence on 5-2-2004 and after considering his claim/request, he passed an order imposing the sentence on the next day i.e., on 6-2-2004 ; accordingly the learned Sessions Judge has complied with the mandatory provision contained in sub-section (2) of Section 235 Cr.P.C. In any event, according to the learned Public Prosecutor, there is no violation of mandatory provision or illegality in convicting and imposing sentence on the accused.

30. Section 235 (2) reads as under:

"Section 235 (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

It is clear that if the Court intends to convict the accused, it is paramount duty on the part of the Court to hear the accused on the question of sentence and the sentence has to be passed on him in accordance with law. Since the trial Judge found him guilty under Section 3 02 I.P.C., the maximum punishment to be awarded is death and the other punishment is imprisonment for life. Learned counsel for the appellant submitted that the accused was not given adequate opportunity, since he was heard and sentence pronounced on the same day. A perusal of Court records, particularly the statement of the accused would show that on 5-2-2004, the accused was questioned about the proposed sentence. The question put by the learned Sessions Judge and the answer given by the accused are as follows:-

@5/2/2004
nf/38/; ck;ik ,/j/r/gpupt[fs; 302 (3 vz;zk;). 307 (3 vz;zk;) 449 fPH; Fw;wthsp vd jPu;khdpj;jpUg;gjhy; ckf;F tH';fg;gltpUf;Fk; jz;lid gw;wp ePtpu; VnjDk; Twpf;bfhs;s ntz;Lkh>

gjpy;/? Fiwe;j jz;lid tH';FkhW nfhUfpnwd;/@

It is clear from the above that the accused was confronted with the proposed punishment on 5-2-2004, and he pleaded for lesser sentence. There is no dispute that the Judgement was delivered only on 6-2-2004 . Though we are satisfied with the same, in view of the doubt raised by the learned counsel for the appellant that the accused was not heard and given adequate opportunity to put-forth his case/grievance with regard to the proposed

sentence, we decided to summon the accused before us in order to give him an opportunity to put-forth his stand/grievance for consideration in awarding punishment. Before venturing the said course, we satisfied ourselves that in appropriate case the appellate Court, namely, this Court can give an opportunity to party (accused) in terms of sub-section (2) of Section 235 Cr.P.C. It is useful to refer a decision of the Apex Court in Ramdeo Chauhan v. State of Assam, reported in (2001) 5 Supreme Court Cases 714. In the case before the Supreme Court, an argument was made that as the sentence and conviction were recorded on the same day, the judgement of the trial Court was against the law. In support of the said contention, the counsel therein relied upon a judgement of the Supreme Court in Muniappan v. State of Tamil Nadu (1981) 3 SCC 11: 1981 SCC (Cri) 617; Malkiat Singh v. State of Punjab (1991) 4 SCC 341: 1991 SCC (Cri) 976 ; and State of Maharashtra v. Sukhdev Singh (1992) 3 SCC 700: 1992 SCC (Cri) 705. After considering sub-section (2) of Section 235 Cr.P. C., Their Lordships have observed that in the aforesaid judgments the amendment made in Section 309 of the Code was not taken note of. By the Criminal Procedure Code Amendment Act, 1978, a proviso was added to sub-section (2) of Section 309 to the effec t that:

"Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him."
The following references of Their Lordships is relevant: (para 27)

"27. In Sukhdev Singh case (1992) 3 SCC 700 this Court while dealing with Section 309 (2), third proviso and Section 235 (2) of the Code and after referring to its earlier decisions in Allauddin Mian v. State of Bihar (1989)3 SCC 5 and Malkiat Singh case (1991) 4 SCC 341 held:

"This proviso must be read in the context of the general policy of expeditious enquiry and trial manifested by the main part of the section. That section emphasises that an enquiry or trial once it has begun should proceed from day to day till the evidence of all the witnesses in attendance has been recorded so that they may not be unnecessarily vexed. The underlying object is to discourage frequent adjournments. But that does not mean that the proviso precludes the court from adjourning the matter even where the interest of justice so demands. The provision may not entitle an accused to an adjournment but it does not prohibit or preclude the court from granting one in such serious cases of life and death to satisfy the requirement of justice as enshrined in Section 235 (2) of the Code. Expeditious disposal of a criminal case is indeed the requirement of Article 21 of the Constitution; so also a fair opportunity to place all relevant material before the court is equally the requirement of the said article. Therefore, if the court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the court, the above extracted proviso cannot preclude the court from doing so."

After saying so, Sethi, J., (majority view) has concluded that: (para 28)

"28....I have no doubt in holding that despite the bar of third proviso to

sub-section (2) of Section 309, the court, in appropriate cases, can grant adjournment for enabling the accused persons to show cause against the sentence proposed on them particularly if such proposed sentence is a sentence of death...."

31. It is useful to refer another judgement of the Supreme Court in the case of Tarlock Singh v. State of Punjab (AIR 1977 Supreme Court 1747) in which it was held that in appropriate cases the appellate court can give an opportunity to the parties in terms of Section 235 (2). In that case, a contention was raised regarding noncompliance of sub-section (2) of section 235 Cr.P.C. Considering the materials and facts and circumstances of that case, after holding that no opportunity was given under Section 235 (2) Cr.P.C., to the appellant (accused) to show cause as to why lesser sentence of life imprisonment should not be inflicted, the Supreme Court held: (para 4)

"4.....It may well be that in many cases sending the case back to the Sessions Court may lead to more expense, delay and prejudice to the cause of justice. In such cases it may be more appropriate for the appellate Court to give an opportunity to the parties in terms of section 235 (2) to produce the materials they wish to adduce instead of going through the exercise of sending the case back to the trial Court. This may in many cases, save time and help produce prompt justice."

32. In Brij Bhushan Sharma v. State of U.P., reported in 2001 (2) Crimes 476, a Division Bench of Allahabad High Court, after finding that there had been failure to comply with the provisions of Section 235 (2) Cr.P.C. and that death penalty has been awarded to the appellant/accused, afforded the said opportunity to him at the appellate stage.

33. In the light of the argument advanced, namely, sufficient opportunity was not given to the accused to put-forth his case with regard to the death sentence, in consonance with the dictum laid down in the above referred cases, we summoned the accused for appearance before us. Even prior to this, during the course of arguments, the accused had sent a letter on 12-3-2004 from his Cell in the Central Prison, Madurai praying for leniency in awarding punishment. Apart from this, he appeared before us on 18-3-2004. When he was confronted with the sentence, he pleaded that he is a coolie getting a meagre income of Rs.25/- by crazing cattle. He further pleaded that he has no issues and that he has to maintain his father and mother, aged 65 and 50 respectively. Thus, we satisfy the requirement of subsection (2) of Section 235 Cr.P.C., and heard the accused on the question of sentence.

34. With the above back-ground, now let us consider whether in the facts and circumstances of the case and the materials placed by the prosecution, capital punishment, namely, death sentence is warranted or the other sentence, namely, life imprisonment is appropriate for the accused. The first decision to be considered on this aspect is in Allauddin Mian v. State of Bihar, reported in 1989 Supreme Court Cases (Cri) 490. The accused who were awarded death sentence are the appellants before the Supreme Court. While considering the question of sentence, Their Lordships have held: (para 12 and 13)

"12. It will be seen from the above, that the Courts below were considerably moved by the fact that the victims were innocent and helpless infants who had not provided any provocation for the ruthless manner in which they were killed. No one can deny the fact that the murders were ghastly. However, in order that the sentences may be properly graded to fit the degree of gravity of each case, it is necessary that the maximum sentence prescribed by law should, as observed in Bachan Singh case (1980) 2 SCC 684,be reserved for 'the rarest of rare case' which are of an exceptional nature. Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a threefold purposes (i) punitive (ii) deterrent and (iii) protective. That is why this Court in Bachan Singh case observed that when the question of choice of sentence is under consideration the court must not only look to the crime and the victim but also the circumstances of the criminal and the impact of the crime on the community. Unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the court should ordinarily impose the lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. In the subsequent decision of Machhi Singh v. State of Punjab (1983) 3 SCC 470 this Court, after culling out the guidelines laid down in Bachan Singh case, observed that only in those exceptional cases in which the crime is so brutal, diabolical and revolving as to shock the collective conscience of the community, would it be permissible to award the death sentence. In the present case, unfortunately the material for choice of sentence is scanty. The motive for the crime is obscure, the one stated, namely, the quarrel between two infants of both sides, does not seem to be correct. The killings were not for gain. The charge shows that the target was P.W.6, the father, and not the two infants. The killing of the two infants was not in the contemplation of any of the accused. Both the girls were the victims of the offenders' ire resulting from frustration at the escape of their target. T here is nothing so uncommon about the crime as to make the case an exceptional one. The mere fact that infants are killed, without more, is not sufficient to bring the case within the category of 'the rarest of rare' cases.

13. In Bachan Singh case the question of laying down standards for categorising cases in which the death penalty could be imposed was considered and it was felt that it would be desirable to indicate the broad guidelines consistent with Section 354 (3) of the Code without attempting to formulate rigid standards. That was because it was felt that standardisation of the sentencing process would leave little room for judicial discretion to take account of variations in culpability even within the same category of cases. After referring to the aggravating circumstances (para 202) and the mitigating circumstances (para 206) pointed out by counsel, the court observed that while these were relevant factors it would not be desirable to fetter judicial discretion. It pointed out that these factors were not exhaustive and cautioned: 'courts, aided by broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and human concern' consistent with Section 354 (3) of the Code. In the subsequent

decision in Machhi Singh case, the court tried to indicate the type of cases which may fall within the exceptional class without attemtping to introduce rigidity. It would not be fair to read the decision as an attempt to fetter judicial discretion. Even in cases of the type indicated in that case, circumstances may vary, which would necessitate a different approach. For example, the circumstances of this case show that the offenders had killed the two girls not because of any hatred for them or to accomplish their objective but out of frustration and anger at having lost their target. Unfortunately as the trial Judge did not give time to the convicts to reflect on the question of sentence, the chance, however remote, of the true motive for the crime surfacing was lost. The antecedents of the accused, their socio-economic conditions, the impact of their crime on the community etc., have not come on record. The absence of these particulars makes the choice of punishment difficult. In view of that we have observed earlier and having regard to the circumstances in which the murder took place, we think the extreme punishment of death is not warranted."

35. In Lehna v. State of Haryana, reported in 2002 Supreme Court Cases (Cri) 526, Their Lordships have explained the circumstances constituting "rarest of rare cases". The principles enunciated by them are relevant while imposing death sentence/imprisonment for life: (para 22 and 23)

"22. The following guidelines which emerge from Bachan Singh case (1980) 2 SCC 684) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCC p.489, para 38)
(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

23. In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the jidicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances.

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arose intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-avis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

35. The following observation of Their Lordships in Subhash Ramkumar Bind @ Vakil and another v. State of Maharashtra, reported in 2003 (1) Crimes 108 (SC) is also relevant for our consideration. While considering the question whether death penalty is sustainable and the appellant/accused is appropriate or not, Their Lordships have held: (para 25)

"25.....While it is true punishment disproportionately severe ought not to be passed but that does not even clothe the law courts, however, with an option to award the sentence which would be manifestly inadequate having due regard to the nature of offence since an inadequate sentence would not subserve the cause of justice to the society. In the contextual facts, we do not find the brutality of such a nature so as to exercise the discretion of passing an order of capital punishment-undoubtedly brutality is involved but that brutality by itself will not bring it within the ambit of the rarest of the rare cases...."

36. In Sevaka Perumal v. State of Tamil Nadu, reported in 1991 Supreme Court Cases (Cri) 724, the Supreme Court has held that a murder committed due to deep seated personal rivalry may not call for penalty of death, but an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence.

37. Though a decision in Subash Chander v. Krishnan Lal, reported in 2001 SCC (Cri) 735 was pressed into service, wherein in the light of the fact that a memo has been filed on behalf of the accused that he would never claim his premature release or commutation of his sentence on any ground and on that basis death sentence was modified to life imprisonment, in the absence of such request or plea either by the counsel or by the accused himself when he appeared before us, we are of the view that the dictum laid down therein is not applicable to the case on hand.

38. It is also useful to refer the latest decision of the Apex Court in Sushil Murmu v. State of Jharkhand, reported in (200 4) 2 Supreme Court cases 338. While considering the death sentence under Section 302 IPC with reference to "special reasons as provided in sub-section 354 (3) Cr.P.C., after referring to the decisions in Bachan Singh v. State of Punjab (1980) 2 SCC 684 and in Machhi Singh (1 983) 3 SCC 470 and after noting the factual finding that 9 year old child was sacrificed in the most brutal and diabolic manner which falls within the "rarest of rare" category, the Supreme Court upheld the death sentence awarded and dismissed the appeal.

39. With regard to the back-ground and family circumstance of the accused, we have already referred to the fact that at the time of the commission of the offences, he was aged 28 years and as on date he is aged 32 years old. He has no issues, though he married 3 women. According to him, he has to look after his father and mother, aged about 65 and 50 years respectively. Though prosecution has established motive for the occurrence, we are satisfied that there is no pre-plan to commit murder. We are also satisfied that there is no deep seated personal rivalry among the two groups etc. Though he murdered 3 innocent people, it was not an organised crime calling for imposition of death sentence as deterrence. We do not find brutality nature so as to exercise the discretion of passing an order of capital punishment. Even otherwise, as observed in Subash Ramkumar Bind @ Vakil's case [2003 (1) Crimes 109], brutality by itself will not bring within the ambit of "the rarest of rare" cases. It is settled law that unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the Court should ordinarily impose the lesser punishment. In Machhi Singh and Bachan Singh cases, the Supreme Court, after culling down guidelines observed that only in those exceptional cases in which the crime is so brutal, diabolical and revolting as to shock the collective conscience of the community, it would be permissible to award the death sentence. In the present case, as discussed earlier, the killings were not for gain. There is nothing so uncommon about the crime as to make the case an exceptional one. The mere fact that his wife and his father-in-law and mother-in-law were killed are not sufficient to bring the case within the category of "the rarest of rare" cases.

4. Under these circumstances, while confirming the conviction imposed on the accused in respect of all the charges, we modify the death sentence awarded for the offence under Section 302 IPC (3 counts) into one of life imprisonment for each count to run concurrently. The sentences imposed on other charges are confirmed. All the sentences are to run concurrently. With the above modification in sentence, the Reference and the Appeal are disposed of.

R.B.

Index:- Yes
Internet:-Yes.

To:-

1. The Principal Sessions Judge, Virudhunagar District at Srivilliputhur with records.

2. The Inspector of Police, Srivilliputhur Town Police Station (Cr.No.434/99), Virudhunagar District.

3. The Superintendent, Central Prison, Madurai.

4. The District Collector, Virudhunagar District.
5. The Public Prosecutor, High Court, Madras.